BSNC LEASING SDN BHD

v.

SABAH SHIPYARD SDN BHD & ORS & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
MOKHTAR SIDIN JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEALS NOS: W-02-432-1999 & W-02-686-1999]
12 JANUARY 2000

CONTRACT: *Construction of terms - Hire-purchase agreement - Lessor advancing money to hirer upon security of a turbine - Whether a true hire-purchase agreement - Whether a loan agreement - Whether a bill of sale - Whether void for non-registration - Application for order of repossession - Whether must necessarily fail - Companies Act 1965, s. 108 - Sale of Goods Ordinance 1957, ss. 19, 20*

CIVIL PROCEDURE: *Injunction - Anti-suit injunction - Injunction to restrain party from proceeding in foreign jurisdiction - Proceedings in respect of same subject matter in Ecuadorian court - Principles - Forum non conveniens - Whether there was genuine need to bring proceedings in Ecuador - Whether proceedings in Ecuador vexatious or oppressive*

In 1995, Sabah Shipyard Sdn Bhd ('Sabah Shipyard') purchased a turbine from Wing Teik Holdings Berhad ('Wing Teik') for RM49 million and paid the latter RM20 million as part payment thereof. The turbine was to be affixed to a power barge ("Victoria II") which Sabah Shipyard undertook to construct and sell to a third party. Subsequently, to raise the balance purchase sum, Sabah Shipyard approached BSNC Leasing Sdn Bhd ('BSNC Leasing') and executed a hire-purchase agreement ('the agreement') with the latter. By the agreement, Sabah Shipyard took the turbine on hire-purchase from BSNC Leasing, the purported owner of the turbine, for RM29 million, while BSNC Leasing would pay Wing Teik the balance purchase price of RM29 million.

Sabah Shipyard defaulted in the payments under the agreement and BSNC Leasing applied for an order to repossess the turbine. The application, however, was dismissed by the learned judge on 21 May 1999 on the grounds that: (i) the property in the turbine had remained with Sabah Shipyard and never passed to BSNC Leasing; and (ii) the agreement was a device to cloak a loan transaction, was in truth an unregistered bill of sale and was void against Sabah Shipyard by reason of s. 108 of the Companies Act 1965.

In the meanwhile, by an agreement dated 21 July 1998, Sabah Shipyard sold Victoria II to Starweaver Ltd. Starweaver Ltd in turn executed a bareboat charter of Victoria II and chartered the vessel to an Ecuadorian company ('Energycorp') for two years.

The facts showed however that, when BSNC Leasing's application for the order of repossession came up for hearing, Victoria II with the turbine affixed was already on its way to Ecuador. BSNC Leasing applied for an order that Victoria II be brought back within the jurisdiction of the Malaysian court, but the application was refused. In the circumstances, whilst its application for repossession of the turbine was still pending in Malaysian court, BSNC Leasing, upon the strength of the agreement, which described it as the owner of the turbine, petitioned the court in Ecuador and obtained an order against Energycorp for the arrest of Victoria II.

Sabah Shipyard responded by applying to the High Court in Malaysia for an order to injunct BSNC Leasing from continuing with the Ecuadorian proceedings on grounds of duplicity in proceedings and *res judicata*. The learned judge ruled that *prima facie* BSNC Leasing had genuine need to bring the proceedings in Ecuador, that the Ecuadorian proceedings were not vexatious or oppressive, and in the event dismissed Sabah Shipyard's application.

Both BSNC Leasing and Sabah Shipyard had appealed. BSNC Leasing appealed against the decision dismissing its application for an order of repossession ('the first appeal'), while Sabah Shipyard appealed against the decision allowing BSNC Leasing to proceed with the proceedings in Ecuador ('the second appeal').

Held:
Per Gopal Sri Ram JCA

[1] To succeed in its application for re-possession, BSNC Leasing had to demonstrate that the property in the turbine had passed to it before it entered into the hire purchase agreement with Sabah Shipyard. Only on that basis could it be argued that there was a genuine hire-purchase transaction.

[2] Wing Teik and Sabah Shipyard did not express any intention as to when property in the turbine will pass. Neither is there any form of conduct or circumstances from which such intention is to be deduced. This being the case, the rule expressed in s. 20 of the Sale of Goods Ordinance 1957 applies with full force. Accordingly, the property in the turbine passed from Wing Teik to Sabah Shipyard when the contract was made. There is as found by the learned judge no

evidence to show any sale either by Sabah Shipyard or Wing Teik to BSNC Leasing. The property in the turbine therefore remained at all material times with Sabah Shipyard.

[3] On the totality of the evidence, the fair inference to be drawn is that Sabah Shipyard owed Wing Teik RM20 million and the (hire-purchase) agreement was used as a device to cloak the real transaction which was a loan upon the security of goods. In short, the agreement was an unregistered bill of sale. Not being in the statutory form, it was non-registrable and was therefore void. The learned judge was therefore correct in dismissing BSNC Leasing's summons for leave to repossess the turbine.

[4] The power in our courts to perpetually restrain a defendant who is amenable to their jurisdiction from prosecuting a claim in a foreign court is founded upon statute. It is derived from a joint reading of ss. 52(3)(e) and 54(a) of the Specific Relief Act 1950. Bearing in mind these two sections, and the authorities, there must be something vexatious or oppressive before the court will interfere to restrain an action in a foreign court. It lies on the plaintiff to show that the foreign action brought by the defendant is vexatious or oppressive.

[5] The jurisprudence on anti-suit injunctions in the environment of private international law reveals three broad categories of cases in which the jurisdiction has been exercised. They may, for convenience, be classified as "single forum cases", "alternative forum cases" and "forum selection cases". From the facts, it is apparent that at the material time, both our courts and those of Ecuador had jurisdiction over the subject matter of dispute. This accordingly is an alternative forum case.

[5a] However, unlike the other alternative forum cases, there was here, at the time when the anti-suit injunction was sought, a judgment in Sabah Shipyard's favour upon the very issue which was pivotal to the possessory action in the Ecuadorian court. Absent that issue and the Ecuadorian proceedings were without foundation. Accordingly, the continued arrest of Victoria II and the prosecution of the action before the tribunal negate the judgment of the High Court at Kuala Lumpur and render the declarations granted thereunder a *mere brutum fulmen*. The Ecuadorian proceedings, therefore, were vexatious and oppressive.

[6] The learned judge, in concluding that BSNC had genuine need to bring the proceedings in Ecuador after commencing proceedings in Malaysia, did not sufficiently appreciate the critical aspects of the case before him. Apart from dealing with it on the footing of the circumstances that existed at the time of the Ecuadorian proceedings, he overlooked the effect those proceedings had upon the declarations he had already granted. The learned judge had failed to sufficiently appreciate the true nature of those proceedings, and had also failed to appreciate that proceedings, though viable at the date of their institution, may become oppressive and vexatious.

[7] In the circumstances of the present case, the proper consequential relief that ought to be granted is a mandatory injunction directing BSNC Leasing to vacate the order of arrest of Victoria II issued by the court in Ecuador and to discontinue all proceedings before that court.

[First appeal dismissed; second appeal allowed; order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pada tahun 1995, Sabah Shipyard Sdn Bhd ('Sabah Shipyard') telah membeli sebuah turbin daripada Wing Teik Holdings Berhad ('Wing Teik') bagi jumlah sebanyak RM49 juta dan membayar pihak yang terkemudian itu RM20 juta sebagai sebahagian daripada pembayarannya. Turbin itu akan dipasangkan kepada sebuah barj kuasa ('Victoria II') yang mana Sabah Shipyard telah mengakujanji untuk membina dan menjualkannya kepada pihak ketiga. Berikutan itu, untuk mendapatkan baki harga belian, Sabah Shipyard telah menemui BSNC Leasing Sdn Bhd ('BSNC Leasing') dan menyempurnakan satu perjanjian sewa-beli ('perjanjian tersebut') dengan pihak yang terkemudian itu. Melalui perjanjian tersebut Sabah Shipyard telah mengambil turbin tersebut atas sewa-beli daripada BSNC Leasing Sdn Bhd, tuanpunya yang dikatakan akan turbin tersebut, bagi jumlah sebanyak RM29 juta, sementara BSNC Leasing pula akan membayar Wing Teik baki harga belian sebanyak RM29 juta.

Sabah Shipyard mengingkari pembayaran-pembayaran di bawah perjanjian tersebut dan BSNC Leasing memohon untuk mendapatkan perintah untuk mengambil milikan semula turbin tersebut. Permohonan tersebut, walaubagaimana pun, telah ditolak oleh hakim yang bijaksana pada 21 Mei 1999 atas alasan bahawa: (i) hartanah dalam turbin tersebut sentiasa kekal bersama Sabah Shipyard dan tidak pernah beralih kepada BSNC Leasing; dan (ii) perjanjian tersebut merupakan satu alat bagi melindungi satu transaksi pinjaman, adalah sebenarnya satu bil jualan tidak berdaftar dan adalah tidak sah terhadap Sabah Shipyard menurut s. 108 Akta Syarikat 1965.

Sementara itu, melalui satu perjanjian bertarikh 21 Julai 1998, Sabah Shipyard telah menjual Victoria II dan menyewakan kapal itu kepada sebuah syarikat Ecuador ('Energycorp') selama dua tahun.

Fakta bagaimanapun menunjukkan bahawa, ketika permohonan BSNC Leasing untuk perintah milikan semula tiba untuk perbicaraan, Victoria II dengan turbin tersebut telah pun dalam perjalanan ke Ecuador. BSNC Leasing memohon perintah supaya Victoria II di bawa balik di dalam bidangkuasa mahkamah Malaysia, tetapi permohonan tersebut telah ditolak. Dalam keadaan tersebut, sementara permohonannya untuk milikan semula akan turbin tersebut masih menanti penyelesaian di mahkamah di Malaysia, BSNC Leasing, berdasarkan perjanjian tersebut, yang menganggapnya sebagai tuanpunya turbin tersebut, telah mempetisyen mahkamah di Ecuador dan mendapatkan perintah terhadap Energycorp bagi penahanan Victoria II.

Sabah Shipyard bertindakbalas dengan memohon kepada Mahkamah Tinggi di Malaya untuk satu perintah bagi menahan BSNC Leasing daripada meneruskan dengan prosiding Ecuador itu atas alasan penggandaan prosiding dan *res judicata*. Hakim yang bijaksana telah memutuskan bahawa *prima facie* BSNC Leasing mempunyai keperluan tulen untuk memulakan prosiding di Ecuador, bahawa prosiding Ecuador itu tidak bersifat menyusahkan atau menindas, dan dalam keadaan itu telah menolak permohonan Sabah Shipyard.

Kedua-dua BSNC Leasing dan Sabah Shipyard merayu BSNC Leasing merayu terhadap keputusan yang menolak permohonannya bagi mendapatkan perintah pemilikan semula ('rayuan pertama'), sementara Sabah Shipyard merayu terhadap keputusan yang membenarkan BSNC Leasing untuk meneruskan prosiding di Ecuador ('rayuan kedua').

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Untuk berjaya dalam permohonannya bagi pemilikan semula, BSNC Leasing terpaksa menunjukkan bahawa hartanah dalam bentuk turbin telah beralih menjadi miliknya sebelum ia memasuki perjanjian sewa beli dengan Sabah Shipyard. Atas dasar ini sahaja ianya boleh dihujah bahawa wujud suatu perjanjian sewa beli yang tulen.

[2] Wing Teik dan Sabah Shipyard tidak menyatakan sebarang niat mengenai bilakah hartanah dalam bentuk turbin itu akan beralih. Tidak juga terdapat sebarang bentuk perlakuan atau keadaan daripada yang mana niat sedemikian boleh diandaikan. Oleh yang demikian, kaedah yang dinyatakan dalam s. 20 Ordinan Penjualan Barangan 1957 terpakai dengan sepenuhnya. Sehubungan itu, hartanah dalam

bentuk turbin tersebut telah beralih daripada Wing Teik kepada Sabah Shipyard apabila kontrak tersebut dibuat. Seperti yang didapati oleh hakim yang bijaksana bahawa tiada bukti atau keterangan bagi menunjukkan sebarang penjualan samada oleh Sabah Shipyard atau Wing Teik kepada BSNC Leasing. Hartanah dalam bentuk turbin tersebut dengan itu kekal pada setiap masa yang material dengan Sabah Shipyard.

[3] Menurut keseluruhan keterangan, inferens adil yang boleh disimpulkan adalah bahawa Sabah Shipyard terhutang kepada Wing Teik sebanyak RM20 juta dan perjanjian (sewa-beli) tersebut telah digunakan sebagai satu alat untuk menyelindungi transaksi yang sebenar yang mana adalah merupakan satu pinjaman di atas jaminan barangan. Secara ringkasnya, perjanjian tersebut adalah satu bil jualan tidak berdaftar. Oleh kerana ianya tidak dalam bentuk statutori, ianya tidak boleh didaftarkan dan dengan itu batal. Hakim yang bijaksana oleh itu telah membuat keputusan yang betul dalam menolak saman untuk kebenaran BSNC Leasing bagi memiliki semula turbin tersebut.

[4] Kuasa dalam mahkamah-mahkamah kita untuk terus menerus menghalang seseorang defendan yang tertakluk kepada bidangkuasa mereka daripada mendakwa sesuatu tuntutan dalam sesebuah mahkamah asing adalah diasaskan atas statut. Ianya didapati dengan membaca bersesama ss. 52(3)(e) dan 54(a) Akta Relief Spesifik 1950. Mengambil kira kedua-dua seksyen ini, serta autoriti-autoriti tersebut, haruslah terdapat sesuatu yang bersifat menyusahkan atau menindas sebelum mahkamah menghalang sesuatu tindakan dalam sesebuah mahkamah asing. Ianya terletak pada plaintif untuk menunjukkan bahawa tindakan asing yang dimulakan oleh defendan adalah bersifat menyusahkan dan menindas.

[5] Jurisprudens atas injunksi anti-guaman dalam persekitaran undang-undang antarabangsa persendirian mendedahkan tiga kategori luas kes-kes dalam mana bidang kuasa telah dilaksanakan. Ianya boleh, demi keselesaan, diklasifikasikan sebagai “single forum cases”, “alternative forum cases” dan “forum selection cases”. Daripada fakta-fakta, ianya jelas bahawa pada waktu yang material, kedua-duanya mahkamah kita dan yang terdapat di Ecuador itu mempunyai bidang kuasa di atas halperkara pertikaian. Ini sehubungan itu merupakan kes forum alternatif (“alternative forum case”).

[5a] Walaubagaimana pun, tidak seperti kes-kes forum alternatif yang lain, di sini terdapat, pada waktu apabila injuksi anti-guaman dipohon, satu penghakiman yang memihak kepada Sabah Shipyard di atas isu yang menjadi paksi kepada tindakan pemilikan dalam mahkamah Ecuador. Jika ketiadaan isu itu, prosiding di Mahkamah Ecuador tidak berasas. Sehubungan itu, penahanan berterusan Victoria II dan pendakwaan tindakan di hadapan tribunal tersebut telah menafikan penghakiman Mahkamah Tinggi di Kuala Lumpur dan menjadikan pengisytiharan yang diberikan di bawahnya satu *mere brutum fulmen*. Prosiding Ecuador, dengan itu, adalah bersifat menyusahkan dan menindaskan.

[6] Hakim yang bijaksana, dalam memutuskan bahawa BSNC mempunyai keperluan yang tulen untuk memulakan prosiding tersebut di Ecuador selepas memulakan prosiding di Malaysia, tidak menghargai secukupnya aspek kritikal kes di hadapannya. Selain daripada menguruskannya atas dasar keadaan-keadaan yang wujud pada waktu prosiding Ecuador, beliau tidak melihat kesan yang diakibatkan oleh prosiding itu ke atas pengisytiharan yang telah beliau berikan. Hakim yang bijaksana telah gagal menghargai secukupnya sifat prosiding itu, dan telah juga gagal menghargai bahawa prosiding meskipun viable pada tarikh permulaannya, boleh menjadi menyusahkan dan menindas.

[7] Dalam keadaan kes semasa, relief sampingan wajar yang harus diberikan adalah injunksi mandatori yang mengarahkan BSNC Leasing untuk menarik balik perintah penahanan Victoria II yang dikeluarkan oleh mahkamah di Ecuador dan untuk menghentikan kesemua prosiding di mahkamah tersebut.

[Rayuan pertama ditolak, rayuan kedua dibenarkan; perintah sekadarnya.]

Case(s) referred to:

Airbus Industrie GIE v. Patel & Ors [1998] 2 All ER 241 ***(refd)***

Amchem Products Inc et al v. Workers Compensation Board [1993] 102 DLR (4th) 96 ***(dist)***

Au Yong Kun Min v. Tractors Malaysia Bhd [1997] 3 CLJ 561 ***(dist)***

Bank of Tokyo Ltd v. Karoon [1987] AC 45 ***(refd)***

Castanho v. Brown & Root (UK) Ltd [1981] 1 All ER 143 ***(refd)***

Domer v. Gulf Oil (Great Britain) [1975] 119 Sol Jour 392 ***(refd)***

Eastern Distributors Ltd v. Goldring [1957] 2 All ER 525 ***(refd)***

European & Asian Bank AG v. Punjab & Sind Bank [1982] 2 Lloyds' Rep 356 ***(refd)***

Films Rover International v. Cannon Film Sales Ltd [1986] 3 All ER 772 ***(refd)***

Harris Solid State Sdn Bhd & Ors v. Bruno Gentil Pereira [1996] 4 CLJ 747 ***(refd)***

Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 ***(refd)***
Kan Yeow Wing v. Keng Soon Motor Finance [1962] MLJ 391 ***(foll)***
MacShannon v. Rockware Glass Ltd [1978] AC 795 ***(refd)***
Metall und Rohstoff AG v. ACLI Metals (London) Ltd [1984] 1 Lloyd's Rep 598 ***(refd)***
Naik v. Balvant AIR [1927] Bom 135 ***(refd)***
North Central Wagon Finance Co Ltd v. Brailsford & Anor [1962] 1 All ER 502 ***(refd)***
R Rama Chandran v. The Industrial Court of Malaysia [1997] 1 CLJ 147 ***(refd)***
Ross T Smyth & Co Ltd v. TD Bailey Son & Co [1940] 3 All ER 60 ***(refd)***
Shamsudin Shaik Jamaludin v. Kenwood Electronics Technologies (M) Sdn Bhd [1999] 3 MLJ 438 ***(refd)***
Sim v. Robinow [1892] 19 R 665 ***(refd)***
SNI Aerospatiale v. Lee Kui Jak & Anor [1987] 3 All ER 510 ***(foll)***
Spiliada Maritime Corp v. Cansulex Ltd [1986] 3 All ER 843 ***(foll)***
Thomas M Heysek & Anor v. Boyden World Corp [1989] 1 MLJ 219 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 108, 176(10)
Courts of Judicature Act 1964, s. 69(4)
Rules of the High Court 1980, O. 92 r. 4
Sale of Goods Ordinance 1957, ss. 19, 20, 21, 22, 23, 24
Specific Relief Act 1950, ss. 52(3)(e), 54(a)

For the BSNC Leasing in both appeals - N Chandran (S Ramesh & SC Cheah with him); M/s Adnan, Sundra & Low
For the Sabah Shipyard in both appeals - William Leong (KC Lee with him); M/s Kadir, Tan & Ramli
For the 3rd respondent in the first appeal - Liza Chan; M/s Liza Chan & Co

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

Preliminary

These two appeals arise out of the same subject matter. When we sat on 22 November 1999, there was only one appeal before us. It was Civil Appeal No. 686/99 ("the second appeal") in which Sabah Shipyard Sdn. Bhd. ("Sabah Shipyard") was the appellant. We then discovered from counsel that there was a related appeal, *viz.*, Civil Appeal No. 482/99 ("the first appeal") in which BSNC Leasing (M) Sdn. Bhd. ("BSNC Leasing") was the appellant. It was against an earlier order made in the same proceedings. It was apparent that a resolution of the first appeal would finally determine the event of the second. But not the other way around.

We therefore suggested that the first appeal be also fixed on short notice and that both appeals be heard together. Counsel agreed. The learned President of the Court of Appeal then issued the appropriate direction pursuant to which both appeals were heard and disposed of, two days later, on 24 November.

Facts And Background

Sabah Shipyard is in the business of constructing, among other things, power barges for the generation of electricity. Turbines are required in the construction of power barges. In or about June 1995, Sabah Shipyard purchased a turbine from Wing Teik Holdings Bhd. ("Wing Teik"). The price was RM49 million. Wing Teik in turn ordered the turbine from Westinghouse Electric Corporation which manufactures turbines in the United States of America. Westinghouse delivered the turbine direct to Sabah Shipyard at Labuan in September 1995.

On 3 January 1996, Wing Teik raised an invoice against Sabah Shipyard for RM49 million. Sabah Shipyard paid Wing Teik RM20million in part payment of the purchase price. It needed to raise funds to settle the balance owing to Wing Teik. It therefore approached BSNC Leasing.

On 3 August 1996, a hire-purchase agreement was drawn up and executed between Sabah Shipyard and BSNC Leasing. The agreement described BSNC Leasing as the owner of the turbine. Under its terms BSNC Leasing purported to hire the turbine out to Sabah Shipyard for a gross sum of RM29 million and interest. Sabah Shipyard was to repay this amount in monthly instalments over 24 months. If it did, and it was not in breach of its covenants under the hire purchase agreement, the property in the turbine was to pass to it at the end of the period of hire. For the purpose of this transaction, Wing Teik's invoice was amended by deleting Sabah Shipyard's name and inserting BSNC Leasing. Following the execution of the hire-purchase agreement BSNC Leasing paid the sum of RM29 million to Wing Teik. Sabah Shipyard then went about constructing a power barge called "Victoria II" and installed the turbine in question as a component in the barge.

Following the economic crisis that descended upon this region in mid 1997, Sabah Shipyard, like so many other businesses began to experience financial hardship. It defaulted in the instalments payable to BSNC Leasing. It also owed monies to other creditors. It wanted to stave off all its creditors in order to earn itself some breathing space. So, acting in conjunction with its holding company, Westmont Industries Berhad, it drew up a scheme of arrangement and moved the court for various orders under s. 176 of the Companies Act 1965. The relief it obtained included an order under s. 176(10) restraining legal proceedings against both companies.

On 3 December 1998, BSNC Leasing intervened in the s. 176 proceedings. It wanted to re-possess the turbine under the terms of the hire purchase agreement. It therefore moved the court for an order enabling it to do so. Sabah Shipyard opposed this application. Another creditor, Usaha Asas Sdn. Bhd. also intervened and opposed the orders sought by BSNC Leasing. The learned judge, after considering the copious documents put in evidence and the arguments of counsel, dismissed BSNC Leasing's application and granted a declaration that the hire-purchase agreement is void. His order is dated 21 May 1999. It is against this order of the learned judge that the first appeal was brought.

In the meantime, on 21 July 1998, Sabah Shipyard entered into an agreement with a company called Starweaver Ltd. under the terms of which it sold the "Victoria II" to the latter. Starweaver Ltd. then chartered the "Victoria II" to an Ecuadorian company called Energycorp Companie Generadorra de Energia S.A. ("Energycorp") on a bare boat charter for two years. By the time BSNC Leasing's application for possession was heard, the "Victoria II" was well on its way to Ecuador. An application by BSNC Leasing to get the vessel to return to the Malaysian jurisdiction failed. The "Victoria II" therefore proceeded to Ecuador.

BSNC Leasing then commenced proceedings in the Ecuadorian court and, pursuant to an order made by that court, arrested the "Victoria II" in the hands of Energycorp. Later, Sabah Shipyard moved the High Court at Kuala Lumpur for an order restraining BSNC Leasing from prosecuting the Ecuadorian proceedings or from commencing any other proceedings in any other jurisdiction in respect of the turbine that formed the subject matter of the hire-purchase agreement. This application was heard and dismissed by the same learned judge who had heard BSNC Leasing's earlier applications. This, then is the order that forms the subject matter of the second appeal.

So much for the factual background against which these appeals rest.

The Issues

At issue in these appeals are the following two questions:

(1) Whether the property in the turbine had ever passed to BSNC Leasing.

(2) Whether the institution and prosecution of the proceedings before the Ecuadorian court (including the order authorising the arrest of the "Victoria II") was vexatious and oppressive in all the circumstances of the case.

The learned judge resolved the first issue against BSNC Leasing and the second issue against Sabah Shipyard. I now turn to consider each issue and the arguments directed upon each of them.

The First Issue: Passing Of Property

To succeed in its application for re-possession, BSNC Leasing had to demonstrate that the property in the turbine had passed to it before it entered into the hire purchase agreement with Sabah Shipyard. Only on that basis could it be argued with any conviction that there was a genuine hire-purchase transaction.

In the court below, Sabah Shipyard argued that the property in the turbine had always remained with it and had never passed to BSNC Leasing. It was contended that the so-called hire-purchase agreement was a sham: a device to cloak the real transaction, which was one of loan upon the security of the turbine. It was also submitted that the hire-purchase agreement was in truth an unregistered bill of sale that was void against Sabah Shipyard by reason of the provisions of s. 108 of the Companies Act 1965.

The learned judge, after a careful analysis of the evidence, agreed with these arguments. He came to the conclusion that the so-called hire purchase was merely a device to cloak what in truth and in fact was a loan transaction. This is how he put it:

> The statement in Part III of the Schedule that the cash price of the goods was RM20 million implied a representation that BSNC, at the date of the Agreement, 3 August 1996, were the owner of the turbine, having bought it for RM20 million. It raised the crucial question of when did BSNC become the owner of the turbine, or when and from whom did they purchase it for RM20 million. Learned counsel for BSNC did not suggest that BSNC bought it from Saship for RM20 million. At one point he submitted that BSNC bought it from Wing Tiek, but Wing Tiek could not have sold it to BSNC because Wing Tiek had already sold it to Saship and received RM29 million from Saship as part of the purchase price. Later on in his submission, learned counsel for BSNC suggested that BSNC became the owner of the turbine at the date of the Agreement. It implied that the signing of the Agreement effected two things simultaneously, namely, a sale by Saship of the turbine to BSNC and a hiring of the turbine back to Saship. But the Agreement was only about hiring, with BSNC claiming that they were already the owner. There was no proof that Saship had sold the turbine to BSNC at any time before the Agreement. In any event they could not have sold it to BSNC because it was already subject to a sale to Ganda as part of the power-barge Victoria II.

> As I have attempted to show, there were various indications in the documents that I have mentioned that went to support the view that the transaction between Saship and BSNC was a loan transaction. That view was strengthened by the consideration that since the turbine was to form a part of the power-barge that Saship were under contract to construct and sell to a third party, a fact that was known to BSNC, BSNC and Saship would have known that a true hire-purchase arrangement, with the essential feature that BSNC were the owner of the turbine with the right to repossession upon default, would not have been possible. The ultimate determinant was the failure on BSNC's part to show, against the history of events that I have set out, at what stage and in what manner they became the owner of the turbine. *BSNC could not succeed in their contention that the Agreement was a true hire-purchase agreement unless they could show that at some distinct point in time before the execution of the Agreement they had become the owner of the turbine.* This they had not been able to do. It was therefore clear to me that the transaction between BSNC and Saship was a lending of RM20 million, with the turbine as security, but cloaked in a hire-purchase agreement. (emphasis added.)

Mr. N. Chandran of counsel for BSNC Leasing criticised this finding of the learned judge. But I must say at once, with all due respect to counsel that I am unable to agree with his arguments.

It is clear from the evidence available in the record provided to us that Sabah Shipyard entered into a contract with Wing Teik to purchase the turbine. That contract was made sometime in June 1995. The turbine was to be delivered and paid for later. Hence Wing Teik's invoice dated 3 January 1996. There is nothing in any of the contemporary documents to indicate the point of time at which the parties intended that property should pass from Wing Teik to Sabah Shipyard. The primary question then is when, if ever, did property in the turbine ever pass to Sabah Shipyard?

In my judgment, that question falls to be resolved in accordance with the relevant provisions of the Sale of Goods Ordinance 1957 which in this instance are ss. 19 and 20. They read as follows:

> 19(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.
>
> (3) Unless different intention appears the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

20. Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price, or the time of delivery of the goods, or both, is postponed.

The effect of these sections may be summarised thus. In a contract for the sale for specific or ascertained goods, property in them passes from the seller to the buyer according to the intention of the parties. That intention is to be gathered from the terms of the contract, the conduct of the parties and all the circumstances of the case. In the absence of a contrary intention, property in specific goods passes to the buyer at the time the contract is made. And it matters not whether the parties have postponed either payment for, or the delivery of, the goods.

It has been recognised by high authority that although the provisions of ss. 20 to 24 are merely rules that operate in the absence of a contrary intention, in practice, they are of much importance. That is because of the extreme difficulty in the great majority of cases to actually prove the intention of the parties. As Lord Wright said in *Ross T. Smyth & Co Ltd. v. T.D. Bailey Son & Co* [1940] 3 All ER 60, 67 when speaking of the corresponding English provisions:

> It is true that all these rules, both under s. 18 and under s. 19, are *prima facie* rules, and depend on intention, but the intention in this regard by the parties is seldom or never capable of proof. It is to be ascertained, as already stated here, by having regard to the terms of the contract, the conduct of the parties and the circumstances of the case.

There may, of course, be cases where the parties by words or conduct evince a clear intention that the property in specific goods is not to pass at the time the contract is made. In such a case, property in the goods will remain in the vendor until the event specified by the contract occurs. A case which illustrates this point is *Au Yong Kun Min v. Tractors Malaysia Bhd.* [1997] 3 CLJ 561; [1997] 5 MLJ 168. There the vendors of a tractor retained ownership of it after having parted with possession to the buyer. They also reserved unto themselves the right to take possession of the tractor if there was any default in payment of any of the sums due under the agreement in question. In an instructive judgment, Augustine Paul J, reviewed all the relevant case law on the point and held quite rightly that the rule governing intention housed in the English equipollent of s. 20 had been displaced.

The present case is a far cry from *Au Yong Kun Min v. Tractors Malaysia Bhd. (ibid)*. Here, Wing Teik and Sabah Shipyard did not express any intention as to when property in the turbine (which comes within the category of "specific goods") will pass from the one to the other. Neither is there any form of conduct or circumstances from which such intention is to be deduced. The rule expressed in s. 20 of the Sale of Goods Ordinance 1957 therefore applies with full force. Accordingly, the property in the turbine passed from Wing Teik to Sabah Shipyard when the contract was made. There is, as the learned judge has found, no evidence to show any sale either by Sabah Shipyard or Wing Teik to BSNC Leasing. The property in the turbine therefore remained at all material times with Sabah Shipyard.

In these circumstances I find the approach adopted by the learned judge to accord entirely with what I apprehend to be the law upon the subject as established in the leading case of *Kan Yeow Wing v. Keng Soon Motor Finance* [1962] MLJ 391.

In that case, the plaintiff, who was pressed by pawnbrokers to whom he owed money, purported to sell his five lorries to the defendant and simultaneously entered into hire-purchase agreements in respect of the five vehicles. He defaulted in making payments of the monthly instalments, and when faced with a demand from the defendants, commenced proceedings for a declaration that the five hire-purchase agreements were void bills of sale. Ong J, (later CJ, (Malaya)) accepted the following observation by Devlin J, in *Eastern Distributors Ltd. v. Goldring* [1957] 2 All ER 525, at p. 527:

> There is, however, nothing to prevent the owner of a vehicle from selling it to a hire-purchase company, pocketing the price and paying it back by instalments; and **provided the sale is a genuine one** and not a sham, effect will be given to it as a hire-purchase agreement. (emphasis added.)

His Lordship also accepted as correct the five propositions set out by Cairns J, in the following passage in his judgment in *North Central Wagon Finance Co. Ltd. v. Brailsford & Anor* [1962] 1 All ER 502:

> I propose now to consider whether the hire-purchase agreement was in law and in fact a bill of sale. There are relevant authorities, and from them I think that the following proposition can be derived: (i) if a person deliberately, with a clear understanding of what he is doing, and with all appropriate formalities, sells his property to a finance company and then hires it back under a hire-purchase agreement, the agreement is not a bill of sale (*Yorkshire Railway Wagon Co v. Maclure* [1882] 21 Ch D 309), a decision of the Court of Appeal; and *British Railway Traffic & Electric Co*

v. Kahn [1921] WN 52, a decision of Rowlatt J; (ii) if the purpose of the transaction is to enable the hirer to dispose of the property to a customer, the courts will more readily hold that the agreement is not a bill of sale (*Staffs Motor Guarantee Ltd v. British Wagon Co Ltd* [1934] 2 KB 305, a decision of MacKinnon J); (iii) if the hire-purchase agreement is a mere device to cloak a loan, the document is a bill of sale (*Maclure*'s case, per Lindley LJ); (iv) in considering whether the real transaction is one of loan, it is necessary to look behind the documents to discover its true nature (*Polsky v. S & A Services, S & A Services v. Polsky* [1951] 1 All ER 185), a judgment of Lord Goddard CJ affirmed by the Court of Appeal; (v) if the facts are not truly stated in the documents, there is a circumstance tending to show that the documents are a mere cloak (*Polsky*'s case).

He then applied the foregoing principles to the case before him as follows (at p. 393):

The fixing of unrealistic prices having no relation to the true values of the vehicles, and the notional setting off of the initial payments therefore makes the conclusion inevitable, that the prices and initial payments were tailored to suit the plaintiff's requirements for adequate cash accommodation to repay the pawnbrokers, in other words, to substitute one creditor for another and that the true purchase agreements were not a mirror of the truth.

I accordingly find that the transaction was one of loan on security rather than a genuine sale and reletting on hire-purchase. The plaintiff accordingly succeeds, and he is entitled to both the declarations prayed, because there was non-registration under the Bills of Sale Ordinance and no memorandum of the contract of loan as required by s. 16 of the Moneylenders Ordinance. The defence of estoppel cannot arise and the counterclaim for arrears of hire likewise fails.

Returning to the present case, if one were to go behind the principal document one would discover not a shred of evidence to show that the turbine in question had been sold to BSNC Leasing at any point in time before the execution of the hire-purchase agreement. Yet the hire-purchase agreement refers to BSNC Leasing as owner of the turbine which is plainly not the truth. Further, it describes the purchase price to be RM20 million when in fact it was RM49 million. Again, as the learned judge pointed out, there are clauses in the hire-purchase agreement which restrict Sabah Shipyard's right to dispose of the turbine. Yet, Sabah Shipyard, to the knowledge of BSNC Leasing proposed to install the turbine into a power barge and dispose off the finished product. In these circumstances it is amazing how BSNC Leasing could possibly have treated the transaction as a genuine hire-purchase. In my judgment, the fair inference to be drawn from the totality of the evidence is that Sabah Shipyard owed Wing Teik RM20 million and the hire-purchase agreement was used as a device to

cloak the real transaction which was a loan upon the security of goods. In short, the hire-purchase agreement was an unregistered bill of sale. Not being in the statutory form, it was non-registrable and was therefore void. Accordingly, the learned judge was entirely correct in dismissing BSNC Leasing summons for leave to re-possess the turbine.

The Second Issue: Restraining The Ecuadorian Proceedings

(A) General Observations

The second appeal raises a point of some importance in the environment of private international law. It has to do with the power of our courts to issue, what have popularly come to be called, "anti-suit injunctions". In the context of private international law, by definition, an anti-suit injunction is one that restrains a defendant from either instituting or prosecuting proceedings in the court of another jurisdiction. As presently advised, it is a subject upon which there has been no decision of this court. Accordingly, I think that this is an appropriate case for this court to re-state the relevant legal principles that operate in this area of the law. The principles involved include those governing the doctrine of *forum non conveniens* which, although not directly in issue in the second appeal, have relevance in some part to it. I shall therefore address the reasons given by the learned judge and the respective arguments of counsel later in this judgment.

(B) Forum Non Conveniens

It is beyond argument that our courts have, in appropriate cases, jurisdiction to stay proceedings commenced within Malaysia on the ground that they amount to an abuse of the court's process. It is an inherent jurisdiction that every court must have in order to control the use to which its process is put by a litigant. Order 92 r. 4, of the Rules of the High Court is declaratory of that jurisdiction. It reads as follows:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

This is "a unique rule of court for while it neither defines nor gives jurisdiction, yet it serves as a reminder and confirmation – lest we forget – of the common law powers of the court, which are residuary or reserve powers and a separate and distinct source of jurisdiction from the statutory powers of the court" (per Edgar Joseph Jr. FCJ, in *R. Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 MLJ 145, at p. 238.)

Because human ingenuity is without limit, the circumstances in which there may be an abuse of the court's process are endless. Accordingly, the jurisdiction to control such abuse is wide and flexible. It is to be exercised according to the peculiar circumstances of a particular case. (See, *Jasa Keramat Sdn. Bhd. v. Monatech (M) Sdn. Bhd.* [1999] 4 CLJ 533; [1999] 4 MLJ 637).

One of the circumstances in which an action may be stayed by a Malaysian court is where, on the facts and evidence disclosed, there is available to the plaintiff a forum in a foreign country having jurisdiction, at which the dispute may more conveniently be litigated. This is known as the doctrine of *forum non conveniens.*

Where an action is properly commenced in this country, that is to say in a case where the High Court is seised of jurisdiction, there is a rebuttable presumption that the domestic court is the *forum conveniens.* The burden is accordingly on the defendant to satisfy the court that action within our jurisdiction should be stayed on the ground that there are factors that weigh in favour of the dispute being litigated before the foreign court. It must be established that there is clearly a more appropriate forum in another country with which the action has the most real and substantial connection and that it is in the interests of justice to have the dispute resolved by that forum. (See, *Sim v. Robinow* [1892] 19 R 665.)

The leading case on the subject is *Spiliada Maritime Corp. v. Cansulex Ltd.* [1986] 3 All ER 843, where Lord Goff of Chieveley formulated the underlying principle in the following terms (at p. 854):

> The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

In deciding where the interests of justice lie, a court may take into account a combination of several factors. These include, but are not confined to, the following matters: (i) that the dispute has a real and substantial connection with the foreign court; (ii) that all or most of the important witnesses are situated within the jurisdiction of the foreign court as in *MacShannon v. Rockware Glass Ltd.* [1978] AC 795); (iii) that the plaintiff will enjoy a personal or juridical advantage by having the dispute tried by the Malaysian court (*Bank of Tokyo Ltd. v. Karoon* [1987] AC 45. On the other hand, it may be a case where there is no clear *forum conveniens,* in which event a stay will generally be refused. (*European & Asian Bank AG v. Punjab & Sind Bank* [1982] 2 Lloyds' Rep. 356.)

(C) The Anti-Suit Injunction

(i) Nature Of The Jurisdiction

The power in our courts to perpetually restrain a defendant who is amenable to their jurisdiction from prosecuting a claim in a foreign court is founded upon statute. It is derived from a joint reading of ss. 52(3)(e) and 54(a) of the Specific Relief Act 1950. These sections provide as follows:

> 52(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:
>
> ...
>
> (e) where the injunction is necessary to prevent a multiplicity of judicial proceedings.
>
> 54. An injunction cannot be granted –
>
> (a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such a restraint is necessary to prevent a multiplicity of proceedings.

It is well known that these provisions are drawn from the Specific Relief Act 1877 of India. Assistance is therefore to be gained from cases decided by the courts of that country on the equipollent provisions of the Indian statute prior to the enactment of the Specific Relief Act 1963 which radically altered the law upon the subject.

My appreciation of the Indian cases decided under the Act of 1877 is that they adopt the same approach to the problem as the courts of England. This appears sufficiently from the decision in *Naik v. Balvant* AIR 1927 Bom. 135. In that case, the defendant filed an action against the plaintiff in the court in the State of Hyderabad. The defendant was resident in that State. For the purposes of private international law, a court in that State was a foreign court, being situated outside British India. The plaintiff in the meantime instituted proceedings in the State of Bombay in respect of the same subject matter. The defendant entered an appearance to that action and delivered a counterclaim. The plaintiff then applied to the High Court at Bombay for an injunction restraining the defendant from proceeding with the Hyderabad action. Macleod J, granted the injunction. The defendant then appealed to the appellate Bench of the Bombay High Court, comprising Marten CJ and Kemp J. He contended that the High Court at Bombay had no jurisdiction to issue the injunction. He also argued that if

there was jurisdiction, then it ought not to be exercised in the plaintiff's favour. The appellate Bench held that the defendant had submitted to the jurisdiction of the Bombay High Court by entering an unconditional appearance and delivering a counterclaim. Dealing with this aspect of the case, the learned Chief Justice said (at p. 137):

> The matter came up before this High Court in *Mulchand Raichand v. Gill & Co.* [1919] 21 Bom. LR 963 (53 IC 518) which was also an appeal from Sir Norman Macleod's decision and there the court held that it had jurisdiction in a case of that nature. I recognize, speaking for my own judgment, that the views there expressed on the points of law which I am now on may be said to be obiter. But, nevertheless, I would like to take pp. 970 and 971 as part of my judgment in the present case, containing as it does references to *Halsbury's Laws of England*, Vol. XVII p. 263; *Dawkins v. Simonetti* [1880] 44 LT 266, a decision of the English Court of Appeal; and *Dicey's Conflict of Laws* (1908 Edn.) pp. 44, 45 and 48; and also *The Carron Iron Company v. Maclaren* [1855] 5 HLC 416. Mr. Justice Heaton, in giving his judgment in *Mulchand Raichand v. Gill & Co.*, held that the judge has complete jurisdiction to make all orders appropriate to the trial and progress of the suit, and that he must have that power over the parties which is essential to a prompt and complete disposal of the suit before him.

On the manner in which the jurisdiction fell to be exercised, Marten CJ, said (at p. 138):

> Holding then, as we do, that we have jurisdiction in this case, the next question is whether this is a proper case in which it should be exercised. Now I think it reasonably clear that the jurisdiction is one of a delicate character, and that it requires to be exercised with it caution. The English cases of *Cohen v. Rothfield* [1919] 1 KB 410, *McHenry v. Lewis* [1882] 22 Ch. D 397, and *Hyman v. Helm* [1883] 24 Ch. D 531, which are all decisions of the English Court of Appeal, fully establish that proposition. So far as the jurisdiction in England is concerned, they go to show that *there must be something vexatious or oppressive before the court will interfere to restrain an action in a foreign court.* So too, in *Vanichand v. Lakhmichand* [1919] 21 Bom. LR 955 (53 IC 395), Mr. Justice Pratt refused in that case to stay proceedings in the Court of Morvi, but it would appear there, at p. 960, that the Morvi suit provided a more complete remedy than the British suit. That case went to the Court of Appeal, but was decided on the point that the order of Mr. Justice Pratt was not a judgment and therefore no appeal lay.
>
> *I do not wish to be led into a precise and accurate definition of the circumstances under which a court in British India will or will not exercise that jurisdiction. I do not think that such a definition could easily, if at all, be framed.* But I do think that we have to consider whether it would

a be a real hardship on the plaintiff if his suit which was instituted first was allowed to proceed in the Hyderabad suit. I have to the best of my ability weighed carefully all that has been said by counsel for the plaintiff in this respect. I recognize that the Bombay suit is the more complete suit of the two. (emphasis added.)

b I will, for completeness, also quote from the judgment of Kemp J. He said (at p. 139):

Prima facie, there is nothing oppressive in a defendant filing a suit in his country when a similar suit is filed against him by his defendant in this court. The decided cases in England show that a foreigner has a right to c prefer-if he thinks he can derive any advantage therefrom-the procedure of the court of his own country. The Courts in England have been slow to exercise their jurisdiction *in personam* in such a case. They laid down that it should be shown that the plaintiff in the English suit should show that there is no advantage which his foreign defendant could obtain from the procedure in the foreign country which he cannot equally obtain in the d English suit: *Cohen v. Rothfield* [1919] 1 KB 410 per Scrutton LJ, at p. 414. Moreover, there is no presumption that the multiplicity of actions is vexatious and a special case must be made out to induce a British Court to interfere: *McHenry v. Lewis* [1882] 22 Ch. D. 397. *It lies on the English plaintiff to show that the foreign action brought by his defendant is* e *vexatious or oppressive.* In *Vanichand Lakhmichand* [1919] 21 Bom. LR 955 (53 IC 395) Mr. Justice Pratt refused the stay of a suit in Morvi State, and that decision was upheld in appeal. Nevertheless, I think it is necessary to proceed with caution in India in applying the principle laid down in the English cases which proceed on the assumption that the foreign courts are courts with an established system of jurisprudence tested by time and to f which litigants can safely have recourse without the fear of not obtaining substantial justice. (emphasis added.)

As will appear momentarily from decisions of high authority, those parts of the judgments quoted above to which I have lent emphasis, continues to represent the traditional view of the law. It is apparent that the passage g of time has done nothing to dilute the principle.

(ii) The Jurisdictional Categories

The jurisprudence on anti-suit injunctions in the environment of private international law reveals three broad categories of cases in which the h jurisdiction has been exercised. They may, for convenience be classified as "single forum cases", "alternative forum cases" and "forum selection cases".

i

A "single forum case" is one in which the Malaysian court is moved for an injunction to restrain the defendant from prosecuting an action in a foreign court which has exclusive jurisdiction over the subject matter of the relevant dispute. In a single forum case, the Malaysian court is moved solely upon the basis that the defendant is amenable to its jurisdiction. There is no other connection between the Malaysian court and the subject matter of the dispute.

An "alternative forum case" is one in which there are two or more available forums for the trial of the particular dispute and Malaysia is one of them.

A "forum selection case" is one in which the parties to the litigation have, by contract, agreed to submit to the exclusive jurisdiction of the Malaysian courts. In such a case, the bringing of, or a threat to bring, proceedings in a foreign court by one party may amount to an invasion or threatened invasion of a legal or equitable right of the other party not to be sued abroad.

At this juncture there is a point of much importance which, I think, ought to be made. It is this. While it may be convenient to resort to classify cases in which the jurisdiction is exercisable, care must be taken not to adhere to rigid categorisation. For, it must not be forgotten that what is being invoked is jurisdiction that is essentially equitable in nature and content. It is a broad and flexible jurisdiction that is primarily concerned with an investigation into where the justice lies, having regard to the peculiar facts of the particular case and having regard to such matters as comity between nations. The authorities have emphasised this. It is sufficient to quote from two cases.

In *Castanho v. Brown & Root (UK) Ltd.* [1981] 1 All ER 143, at p. 149, Lord Scarman said:

> The considerable case law to which your Lordships have been referred does not, in terms, express any limitation on the sorts of cases in which it may be appropriate to exercise the jurisdiction. Counsel for the plaintiff, however, submitted that it is to be found to have been exercised only in two classes of cases: (1) *'lis alibi pendens'*, where the object is to prevent harassment (he cited as examples *The Christiansborg* [1885] 10 PD 141, with especial reference to the judgment of Baggallay LJ (at 152-153), *The Hagen* [1908] P 189 at 202, [1908-10] All ER Rep 21 at 26 and *The Janera* [1928] P 55, [1927] All ER Rep 490); and (2) where there is a right justiciable in England, which the court seeks to protect. In support of his second class, counsel cited a passage from the speech of Lord Diplock in *The Siskina* [1977] 3 All ER 803 at 824, [1979] AC 210 at 256:

> A right to obtain an interlocutory injunction is not a cause of action … It is dependent on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court.
>
> No doubt, in practice, most cases fall within one or other of these two classes. **But the width and flexibility of equity are not to be undermined by categorisation**. Caution in the exercise of the jurisdiction is certainly needed; but the way in which the judges have expressed themselves from 1821 onwards amply supports the view for which the defendants contend that the injunction can be granted against a party properly before the court, where it is appropriate to avoid injustice. (emphasis added.)

In *SNI Aérospatiale v. Lee Kui Jak & Anor.* [1987] 3 All ER 510, Lord Goff of Chieveley said (at p. 519):

> The decided cases, stretching back over a hundred years and more, provide however a useful source of experience from which guidance may be drawn. They show, moreover, judges seeking to apply the fundamental principles in certain categories of case, while at the same time never asserting that the jurisdiction is to be confined to those categories.

It is sufficient, for a resolution of the issue that lies at the core of the second appeal, to consider the law governing alternative forum cases. For reasons that will be apparent later, the other categories are not relevant. We are here not dealing with either a single forum case. Nor are we concerned with a forum selection case.

(iii) Alternative Forum Cases

The principle governing the jurisdiction of the court in an alternative forum case was authoritatively stated in *SNI Aérospatiale v. Lee Kui Jak & Anor. (ibid)*. The facts of that case were as follows.

A businessman resident in Brunei was killed when the helicopter in which he was travelling crashed. The accident took place in Brunei. The helicopter had been manufactured by SNI Aérospatiale, a French company which had a place of business in the State of Texas in the United States. An English company, British and Commonwealth Shipping Co (Aviation) Ltd., owned the helicopter. At all material times, it was operated by and serviced by Bristow Helicopters Malaysia Sdn Bhd, a Malaysian company. The plaintiffs, who were the widow and administrators of the estate of the deceased businessman commenced proceedings against SNI Aérospatiale and Bristow Helicopters both in Brunei and Texas. SNI Aérospatiale then

moved the courts of Brunei for an injunction to restrain the plaintiffs from continuing with the Texas action. The Court of Appeal of Brunei refused the application. SNI Aérospatiale then appealed to the Privy Council which allowed the appeal and granted the injunction.

Lord Goff of Chieveley, when delivering the advice of the Board formulated the principle (at p. 522):

> In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action, and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff is he is not allowed to do so. So, as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him.

This approach to the court's jurisdiction was affirmed by the House of Lords recently in *Airbus Industrie GIE v. Patel & Ors.* [1998] 2 All ER 241, where the facts were these.

On 14 February 1990, an Airbus A-320 crashed at Bangalore airport. Many of the passengers died. The remainder were injured. Among the passengers on board were two families. They were of Indian origin. But they were British citizens. And they had their homes in England. Four of them were killed. Four others were injured. These two families or their representatives ("the defendants") commenced proceedings in India against the airport authority of Bangalore. Later, they also commenced proceedings in Texas against a number of persons, including Airbus Industrie ("the plaintiff"). In response to these proceedings, the plaintiff brought proceedings in Bangalore against the defendants and obtained declarations that, *inter alia*, deterred the defendants from prosecuting the Texas action. The plaintiff then took out an originating summons in England to enforce the Bangalore judgment against the defendants. An injunction was also sought to restrain the defendants from prosecuting the action in Texas on the ground that it would be contrary to justice and/or vexatious or oppressive.

The summons came before Colman J, who refused to enforce the declarations obtained by the plaintiff in Bangalore. He also declined the injunction. The plaintiff appealed only against the refusal of the injunction. The Court of Appeal reversed. On further appeal, the House of Lords reversed the Court of Appeal and restored the judgment at first instance.

Lord Goff of Chieveley who delivered the leading speech, having reviewed the English, Australian, Canadian and American cases, said (at p. 264):

> As I have already indicated, the first and crucial question which arises in the present case is whether the English court will grant an anti-suit injunction in circumstances where there is no relevant connection between the English jurisdiction and the proceedings in question other than that the defendants, who are resident in this country, are subject to the jurisdiction and so can effectively be restrained by an injunction granted by an English court.
>
> I wish first to observe that this question may arise not only in cases such as the present, usually described as 'alternative forum cases' (the two most relevant jurisdictions here being India and Texas), but also in what have been called 'single forum cases,' in which (for example) the English court is asked to grant an anti-suit injunction to restrain a party from proceeding in a foreign court which alone has jurisdiction over the relevant dispute. The distinction is of some importance in the present context, and I shall have to refer to it later. But for the moment it is enough for me to say that, in both categories of case, the basis of the jurisdiction has been traditionally stated in broad terms which are characteristic of the remedy of injunction as used in our domestic law. *In alternative forum cases, it has been stated that the jurisdiction will be exercised as the ends of justice require, and in particular where the pursuit of the relevant proceedings is vexatious or oppressive; in single forum cases, it is said that an injunction may be granted to restrain the pursuit of proceedings overseas which is unconscionable.* The focus is, therefore, on the character of the defendant's conduct, as befits an equitable remedy such as an injunction. In particular, although it has frequently been stated that comity requires that the jurisdiction to grant an anti-suit injunction should be exercised with caution, no requirement has been imposed specifically to prevent the grant of an anti-suit injunction in circumstances which amount to a breach of comity. The present case raises for the first time, and in a stark form, the question whether such a requirement should be recognised and, if so, what form it should take.
>
> In alternative forum cases, in which the choice is between the English forum and some other forum overseas, an anti-suit injunction will normally only be applied for in an English court where England is the natural forum for the resolution of the dispute; and, if so, there will be no infringement of comity. England was assumed to be the natural forum in a passage in the

judgment of the Privy Council in *SNI Aérospatiale v. Lee Kui Jak* [1987] 3 All ER 510, [1987] AC 871, which was delivered by myself. There, with reference in particular to cases such as the present, I said ([1987] 3 All ER 510 at 520-521, [1987] AC 871 at 894):

> Their Lordships refer, in particular, to the fact that litigants may now be encouraged to proceed in foreign jurisdictions, having no connection with the subject matter of the dispute, which exercise an exceptionally broad jurisdiction and which offer great inducements, in particular greatly enhanced, even punitive, damages, that they may tempt litigants to pursue their remedies there. In normal circumstances, application of the now very widely recognised principle of *forum non conveniens* should ensure that the foreign court will itself, where appropriate, decline to exercise its own jurisdiction … But a stay may not be granted; and, if the English court concludes that it is the natural forum for the adjudication of the relevant dispute, and that by proceeding in the foreign court the plaintiff is acting oppressively, the English court may, in the interests of justice, grant an injunction restraining the plaintiff from pursuing the proceedings in the foreign court.

It is to be observed that the example there given presupposes that the English court is the natural forum for the adjudication of the dispute, though it is not stated in terms whether that is a prerequisite of the exercise of the jurisdiction in an alternative forum case, no doubt because the point did not there arise for decision. In a later passage in the same judgment I did however state that, as a general rule, the court granting the injunction must conclude that it is the natural forum for the trial of the action (see [1987] 3 All ER 510 at 522, [1987] AC 871 at 896).

Later, (at p. 269), he introduced what I consider to be an important qualification of a general nature in relation to alternative forum cases:

> As a general rule, before an anti-suit injunction can properly be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction in cases of the kind under consideration in the present case, comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails.
>
> In an alternative forum case, this will involve consideration of the question whether the English court is the natural forum for the resolution of the dispute.

In my judgment whether the institution or threatened institution of proceedings in a foreign court would be vexatious or oppressive would depend upon the peculiar facts of the particular case. When deciding this question, a court must have regard to all the circumstances of the case

including such matters as comity, the interests of the parties, the connection that the dispute has with the alternative forums and the need to exercise caution when restraining foreign proceedings. (See, *Metall und Rohstoff AG v. ACLI Metals (London) Ltd.* [1984] 1 Lloyd's Rep. 598.)

I derive support for this view from an earlier passage in the judgment of Lord Goff in *SNI Aérospatiale v. Lee Kui Jak & Anor. (supra)* where he said (at p. 520):

> The old principle that an injunction may be granted to restrain the pursuit of foreign proceedings on the grounds of vexation or oppression, though it should not be regarded as the only ground on which the jurisdiction may be exercised, is of such importance, and of such apparent relevance in the present case, that it is desirable to examine it in a little detail. As with the basic principle of justice underlying the whole of this jurisdiction, it has been emphasised that the notions of vexation and oppression should not be restricted by definition. As Bowen LJ said in *McHenry v. Lewis* [1882] 22 Ch D 397 at 407-408:
>
> > I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case.

So much for what I apprehend to be the principles governing anti-suit injunctions. I now turn to apply these principles to the facts of the second appeal.

Application Of Law To The Facts

In the present case, the hire-purchase agreement pursuant to which BSNC Leasing asserted title to the turbine was entered into in Malaysia. In any event, BSNC Leasing submitted itself to the jurisdiction of the High Court at Kuala Lumpur by moving it for the order for re-possession. The High Court therefore had jurisdiction over the relevant dispute. Thus, having regard to the facts of the case, it is also the natural forum for the resolution of the dispute between the parties.

The basis on which the Ecuadorian court was moved appears sufficiently from a letter dated 3 May 1999, from BSNC Leasing's lawyers in Ecuador to Mr. Chandran. In it they say that a petition was filed in the Ecuadorian court on 20 April 1999. They confirm that the arrest was effected on 27 April 1999. They then go on to say as follows:

> The arrest petition is grounded on the fact that our client BSNC Leasing (M) entered on the 3rd. of August, 1996 on a Leasing Agreement with the company Sabah Shipyard SDN BHD whereby BSNC Leasing (M.) retained the title and full property of the said Turbine. Despite the existence of such Leasing Agreement, the defendant ENERGYCORP entered in a Power Purchase Agreement with the Ecuadorian Government dated September 16th 1998 in which ENERGYCORP stated that the Turbine is its property. The Ecuadorian Government has signed and entered in such PPA Agreement under the believe that the said Turbine is of the property of ENERGYCORP S.A.
>
> The action started in Ecuador is a 'possesory action' whereby the plaintiff request to the court to arrest the Turbine with the sole purpose to denied that the turbine goes out of the jurisdiction. If ENERGYCORP furnishes a suitable guarantee the court will be obliged to lift the arrest. BSNC is entitled to pursue the action in Ecuador because of two grounds: 1 – The Turbine is in this jurisdiction and 2. – The defendant ENERGYCORP S.A. is an Ecuadorian based company. Therefore there is no question as to the validity of the forum.

From these facts, it is apparent that at the material time, both our courts and those of Ecuador had jurisdiction over the subject matter of dispute. This is accordingly an alternative forum case. But with a critical difference. Unlike the other cases to which I have referred earlier in this judgment, there was here, at the time when the anti-suit injunction was sought, a judgment in Sabah Shipyard's favour upon the very issue which was pivotal to the possessory action in the Ecuadorian court. Absent that issue, the Ecuadorian proceedings were without a foundation. Accordingly, the continued arrest of the "Victoria II" and the prosecution of the action before the latter tribunal negate the judgment of the High Court at Kuala Lumpur and render the declarations granted thereunder a mere *brutum fulmen.* To use the language of the authorities, the Ecuadorian proceedings were vexatious and oppressive.

Despite these compelling circumstances the learned judge refused the relief sought by Sabah Shipyard. His reasons are encapsulated in the following passage in his judgment:

> In the final analysis, this is what I conceive the true position as regards BSNC to be. BSNC's concern has been to get physical possession of the turbine. Had the turbine remained within Malaysian jurisdiction, they would have had no reason to seek adjudication in any other country. But the turbine had left Malaysian jurisdiction and, before their application was determined, had passed into the jurisdiction of Ecuador. It would not directly or immediately bring the turbine into their possession even if the Malaysian court were to rule that they were entitled to possession. They had to seek the determination of the court in Ecuador, where the turbine was and is, so that, if the court in Ecuador ruled in their favour, the turbine would be there to be possessed. They had to begin by having the turbine arrested so that it would remain within the jurisdiction of the country where the question was to be decided. *Prima facie*, therefore, I think BSNC had genuine need to bring the proceedings in Ecuador after commencing proceedings in Malaysia.

With much respect, it is apparent that the learned judge, however, did not sufficiently appreciate the critical aspects of the case before him. First, he dealt with it purely on the footing of the circumstances that existed at the time the Ecuadorian proceedings were commenced. He overlooked the effect those proceedings had upon the declarations he had already granted.

Second, while reminding himself of the reasons for the launch of the Ecuadorian proceedings he failed sufficiently to appreciate the true nature of those proceedings: that they were merely to serve the purpose of a holding over measure at a time when there had been no decision on the merits of BSNC Leasing's summons for re-possession.

Third, the learned judge failed to appreciate, sufficiently or at all, that proceedings, though viable at the date of their institution, may become oppressive and vexatious or an abuse of process by reason of subsequent events. He ought therefore to have judged the summons before him on the state of the facts as they then stood and not upon the preceding set of facts. The principle is exemplified by *Domer v. Gulf Oil (Great Britain)* [1975] 119 Sol. Jour. 392. There is a note of that case in Vol. 51 ALJ 607, the relevant part of which reads as follows:

> That the expression 'abuse of the process of the court' does not necessarily reflect adversely on the plaintiff or his legal advisers is further borne out by the relatively recent decision of Megarry J. in *Domer v. Gulf Oil (Great Britain) Ltd.* ([1975] Law Society's Gazette, Case Reports, 26th March, 1975, p. 47), according to which, although when originally instituted a plaintiff's proceeding was not an abuse of process, it may become so, depending upon the particular nature of the legal right sought to be enforced, if events occurring subsequently 'inescapably' foredoom the proceeding to 'failure'. In that case, the plaintiff had initially issued an

originating summons claiming a new tenancy under the relevant provisions of the Landlord and Tenant Act 1954 (U.K.), but by reason of later happenings it became impossible legally to sustain the claim to such a new tenancy. Megarry J.'s decision was founded upon the terms of RSC, O. 18 r. 19(1) ('... otherwise an abuse of the process of the court'), but his reasoning is equally applicable to the inherent jurisdiction of striking out a proceeding upon the ground of abuse of the process of the court.

It is beyond doubt that the relief of an anti-suit injunction lay within the discretion of the learned judge. On an appeal against the exercise of discretion the initial function of this court is merely one of review. But where, as here, it is demonstrated to a conviction that the learned judge failed to take into account relevant considerations and misdirected himself on the proper approach to be adopted to the case before him, it is, I think, the plain duty of this court to intervene and exercise its own discretion is accordance with well settled principles.

Before concluding my judgment on this part of the case there is one other authority that I ought to mention. It is the decision of the Supreme Court of Canada in *Amchem Products Inc. et al v. Workers Compensation Board* [1993] 102 DLR (4th) 96. Mr. Chandran placed much reliance on it when opposing the second appeal. He said that this decision resolved the point in his favour. It therefore becomes necessary to examine the facts of that case and the reasoning behind the decision.

In *Amchem Products (ibid)*, the plaintiffs were companies who were or had engaged in the manufacture, sale and supply of asbestos products used in the construction of ships and buildings. Most of them were incorporated in the United States and had their principal place of business there. Although most of them carried on business in Texas, they had not been incorporated in that State.

Of the defendants, a substantial number of them had suffered injury through exposure to asbestos. Others were the dependants of workmen who had died as a result of such exposure. Most of the defendants were resident in the Province of British Columbia. They had elected to receive compensation from the Workers Compensation Board for the death or injury that had been occasioned through exposure to asbestos. The Board therefore acquired rights through subrogation. The defendants brought an action against the plaintiffs in the court in Texas.

At first the plaintiffs challenged the jurisdiction of the Texas court. But they did not succeed. They then instituted proceedings in British Columbia for an anti-suit injunction, that is to say, an injunction to restrain the defendants from continuing with the action against them in Texas. In the

meantime, such of the defendants who were not resident in British Columbia obtained an anti-anti-suit injunction from the Texas court against the plaintiffs, that is to say, restraining the plaintiffs from obtaining any further anti-suit injunctions in Canada.

The Supreme Court of British Columbia granted the plaintiffs the anti-suit injunction it sought. The Court of Appeal of British Columbia dismissed an appeal to it by the Board and the other defendants. A further appeal to the Supreme Court of Canada succeeded. The headnote to the report summarises the finding of the court as follows:

> The domestic court can entertain an application for an anti-suit injunction only if it is alleged to be the most appropriate forum and is potentially an appropriate forum. A court must first determine whether the domestic forum is the natural forum – that is, the forum that on the basis of relevant factors has the closest connection with the action and the parties – or whether there is another forum that is clearly more appropriate. If, applying the principles relating to *forum non conveniens*, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should dismiss the application. If a contrary conclusion is reached, the domestic court should go on to determine if the granting of an injunction will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him.
>
> The trial judge erred in granting an anti-suit injunction. With respect to the choice of forum, having concluded that the Texas court did not apply a *forum non conveniens* test, he failed to consider whether, notwithstanding that fact, the decision was consistent with applicable principles of private international law. Secondly, although he was of the view that the alleged loss of juridical advantage had little substance, he decided that the Texas proceedings were oppressive. In respect of both branches of the rule, he gave undue weight to the absence of a *forum non conveniens* rule in Texas and to the anti-anti-suit injunction granted by the Texas court. The principle of comity does not require that the decision of the foreign court be based on the doctrine of *forum non conveniens*. The Texas court assumed jurisdiction on the basis of the fact that some of the respondents were resident in that state and carried on business, or some were not resident but carried on business in Texas. The finding of sufficient contact with Texas was supported by the evidence and hence, the jurisdiction in Texas was asserted according to the due process clause of the American Constitution. The application of this provision is consistent with Canadian rules of private international law relating to *forum non conveniens.*

Mr. Chandran read to us the following passage in the judgment of Sopinka J, delivered for the court (at p. 118 of the report) in support of his argument:

> First, it is useful to discuss some preliminary aspects of procedure with respect to anti-suit injunctions. As a general rule, the domestic court should not entertain an application for an injunction if there is no foreign proceeding pending. While *quia timet* injunctions are granted by the courts, that is done only if the applicant establishes that some threatened action by the defendant will constitute an actionable civil wrong. In general, an injunction is a remedy ancillary to a cause of action: see Case Comment, Elizabeth R. Edinger [1992], 71 Can. Bar Rev. 117 at p. 127. In this respect the anti-suit injunction is unique in that the applicant does not have to establish that the assumption of jurisdiction by the foreign court will amount to an actionable wrong. Moreover, although the application is heard summarily and based on affidavit evidence, the order results in a permanent injunction which ordinarily is granted only after trial. In order to resort to this special remedy consonant with the principles of comity, it is preferable that the decision of the foreign court not be pre-empted until a proceeding has been launched in that court and the applicant for an injunction in the domestic court has sought from the foreign court a stay or other termination of the foreign proceedings and failed.
>
> If the foreign court stays or dismisses the action there, the problem is solved. If not, the domestic court must proceed to entertain the application for an injunction but only if it is alleged to be the most appropriate forum and is potentially an appropriate forum. In any case in which an action has been commenced in the domestic forum, it can be expected that the domestic forum is being put forward as an appropriate forum by the plaintiff. In resisting a stay, the plaintiff will also contend that there is no other forum which is clearly more appropriate and that, therefore, the defendant has not compiled with the test which I have outlined above. If no action has been commenced in the domestic forum, it has no juridical basis for entertaining an application for an injunction unless it is contended by the applicant that the action should have been commenced in the domestic forum as the more appropriate place of trial and it is potentially an appropriate forum.

With respect to counsel, I am of the view that this passage does not assist him. In the first place, the judgment cited postulates, as a general rule, that proceedings must have been instituted in a foreign court. That is squarely met in the present instance. BSNC Leasing did commence proceedings in the court in Ecuador and it obtained the arrest of the "Victoria II". In doing so, it relied on the hire purchase agreement to establish its ownership: an issue that had already been resolved against it by the learned judge.

Second, the *forum conveniens* test is satisfied in respect of the Malaysian proceedings. The contract for the sale of the turbine between Sabah Shipyard and Wing Teik was entered into in Malaysia. The hire purchase agreement pursuant to which BSNC Leasing made its claim for possession

was also made in Malaysia. Sabah Shipyard, BSNC Leasing and Wing Teik are all Malaysian companies. The dispute as to the ownership of the turbine arose in Malaysia and was decided by the Malaysian Court in favour of Sabah Shipyard. Objectively speaking, therefore, Malaysia is the natural forum for the resolution of the dispute.

Consequential Relief

The grant of an anti-suit injunction, in my view, will not of itself resolve the difficulties raised in the second appeal. All that it does is to restrain the further prosecution of the Ecuadorian action. But one is still left with the problem of the order of arrest and the other proceedings currently pending before the foreign court. It is necessary to deal with those matters as a whole so as to render complete justice in the case.

In the circumstances of the present case, the proper consequential relief that ought to be granted is a mandatory injunction directing BSNC Leasing to vacate the order of arrest of the "Victoria II" issued by the court in Ecuador and to discontinue all proceedings before that court.

In my view there is ample power in this court to make such consequential orders by reason of s. 69(4) of the Courts of Judicature Act 1964. (See *Harris Solid State Sdn. Bhd. & Ors. v. Bruno Gentil Pereira* [1996] 4 CLJ 747; [1996] 3 MLJ 489.) And it may now be treated as settled that the principles upon which a mandatory injunction may be granted are the same as those upon which a prohibitory injunction is granted. At the end of the day the court has to determine where the justice of the particular case lies. (See, *Films Rover International v. Cannon Film Sales Ltd* [1986] 3 All ER 772; *Thomas M Heysek & Anor v. Boyden World Corp* [1989] 1 MLJ 219; *Shamsudin bin Shaik Jamaludin v. Kenwood Electronics Technologies (M) Sdn Bhd*. [1999] 3 MLJ 438.) For, "the question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction." (per Hoffmann J, (as he then was) in *Films Rover International v. Cannon Film Sales Ltd.* (*ibid* at p. 781.)

Conclusion

For the reasons given, the first appeal was dismissed and the second appeal was allowed. The orders that usually follow a dismissal were made in the first appeal. The orders that usually follow success were made in the second appeal together in addition to the consequential orders referred to earlier in this judgment. The deposits in court in each appeal were directed to be disposed of in the usual manner.

My learned brothers Mokhtar Sidin and Haidar Mohd Noor, JJCA, have seen this judgment in draft and agree with the reasoning and the conclusions therein.